Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re applications of	)	MM Docket No. 93-75
Trinity Broadcasting of Florida, Inc. for Renewal of License of Station WHFT-TV, Miami, Florida	)	File No. BRCT-911001LY
Glendale Broadcasting Company for a Construction Permit for a New Commercial Television to Operate on Channel 45, Miami, Florida	)	File No. BPCT-911227KE
To the Review Board		

SPANISH AMERICAN LEAGUE AGAINST
DISCRIMINATION'S REPLY TO EXCEPTIONS

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February 28, 1996

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applications featuring minorities controlled by nonminorities and acting only in the interest of the nonminorities.

6. The heart of Trinity's new theory is its claim of detrimental reliance on the dissenting statement of Commissioner Patrick in Amendment of §73.3555, 100 FCC2d 74, 95 (1985) ("§73.3555"). Trinity seizes upon Commission Patrick's criticism that in the majority's decision, "[n]o concern is given as to whether the 51% minority owners will exert any influence on the station's programming or will have any control at all." Id. at 104.

7. Commissioner Patrick was obviously speaking in terms of the prospective enforceability rather than the requirements articulated in the rule the Commission adopted, for that rule could not be more unambiguous. The rule, 47 CFR §73.3555(d)(1), allows the acquisition of an interest in fourteen stations of a given type where at least two have cognizible interests owned and controlled by minorities. Note 1 to the Rule requires that the minorities possess "actual working control in whatever manner exercised."4/

8. Commissioner Patrick sought assiduous rule compliance. He would undoubtedly frown on the invocation of his own heartfelt concerns as a post-hoc rationalization for noncompliance.

4/ The Commission should reject Trinity's interpretation of Schedule of Fees, 50 FCC2d 906, 907-08 ¶5 (1975), which Trinity reads as holding that "a statutory interpretation stated in a dissenting opinion uncontradicted by the majority is authoritative." Trinity Exceptions at 7 ¶11 (emphasis supplied). The majority's decision in Amendment of §73.3555 contradicts Patrick's dissent.

9. Furthermore, there is no evidence in the record that when Trinity operated NMTV, it relied on Commisssioner Patrick's dissent. Had Trinity so relied, it surely would have said so in at least one of the many Wilmington and Miami predesignation pleadings. Those pleadings do not rely on the Patrick dissent.

II. THE BUREAU'S INCORRECT 1994 INTERPRETATION OF THE LPTV OWNERSHIP RULES DOES NOT EXCUSE TRINITY'S EARLIER DELIBERATE EVASION OF THOSE RULES

10. For a brief time (when it filed its trial brief) the Bureau had an incorrect interpretation of the intention of the LPTV rules as regards minority LPTV ownership. The Bureau was obviously wrong, as the ALJ pointed out in crisp form. I.D. at 12060 n. 43. The Bureau's Exceptions accept the ALJ's reasoning.

11. Trinity now seizes upon the Bureau's momentary confusion as an excuse for its earlier misconduct, arguing that an agency "internally divided" against itself cannot stand against misconduct. Trinity Exceptions at 6. Trinity would have a valid point but for the fact that the Bureau's confusion came too late for Trinity to rely upon. The record had closed when the Bureau misstated the law. Trinity did not rely on the Bureau's misstatement of the law when Trinity created and controlled NMTV.

III. THE COMMISSION'S POLICY AGAINST FRONTS IS NEITHER COMPLEX NOR TECHNICAL, NOR IS IT NEW

12. Trinity contends that the Commission's rules delineating the nature of ownership and control are too "complex" and "technical" to be enforceable. Trinity Exceptions at 8.[5/]

5/ There is no merit to Trinity's closely related "advice of counsel" defense. Such a defense is unavailing given the sophisticated nature of the communications bar.

12. Broadcasting is not widget manufacturing, and broadcasters are accustomed to detailed rules. Indeed, the rules and policies governing fronts and frauds are among the simplest ones. This is not the alien ownership policy construed in Fox Television Stations, Inc., 10 FCC Rcd 8452 (1995), in which the relevant statutory provision, Section 310(b)(4), containing its famous double negative, really does take a few minutes of concentration to parse. By comparison, §73.3555(d)(1) is a model of clarity. Its Note 1 requires that minorities exercise "actual working control in whatever manner exercised." What part of "actual working control" does Trinity not understand?

13. Trinity also suggests that it should not be held to a high standard of compliance because the minority exception in §73.3555 was a "new policy" and this was the "first case" under that policy. Trinity Exceptions at 8, 31. Many years ago, the Commission sometimes did tread lightly when it faced even egregious cases of first impression.6/ Fortunately, the public interest and civil rights movements, coupled with public revulsion over scandals in issuing TV licenses, brought that era to an end. Trinity cites no recent case, nor is SALAD aware of any, in which the Commission imposed no liability on the theory that the wrongdoer was the "first" to violate the rule.

6/ See, e.g., The Columbus Broadcasting Company, 40 FCC 641 (1965), in which a broadcaster was responsibly accused (by J. Edgar Hoover's FBI, not known for filing civil rights complaints) of helping incite the riot at the University of Mississippi which attended the enrollment of James Meredith. Although two people died in the riot, the Commission declared the case one of first impression and merely admonished the licensee not to use its airwaves to encourage its listeners to kill one another.

14. Section 73.3555(d)(1) may be "new", but the underlying principle in this case is among the oldest, best established, best understood and least controversial of all Commission policies: the agency must know that its licensees are who they say they are. Heitmeyer v. FCC, 95 F.2d 91, 99 (D.C. Cir. 1937). Nothing is more fundamental to the system of licensing that the Commission know who is in charge of the stations it licenses. The Commission quite rightly examines broadcasters who play fast and loose with the ownership rules, for those rules, almost alone after deregulation, determine whether the public obtains a diverse spectrum of broadcast content.

15. There is no separate, more liberal rule when minorities are involved. That is clear from the long line of minority front cases involving applications for new facilities. See, e.g., Northampton Media Associates, 3 FCC Rcd 5164, 5170-71 (Rev. Bd. 1988), review denied, 4 FCC Rcd 5517 (1989) (subsequent history omitted) (expressly criticizing nongenuine ownership structures designed merely to exploit the racial preference policies.) In this respect, at least, the law is unsegregated.

IV. ROY STEWART AND ALAN GLASSER DID NOT INVITE TRINITY TO MAKE SPORT OF THE COMMISSION'S RULES

16. Trinity makes the preposterous suggestion that its oral consultations with Alan Glasser and Roy Stewart put the Commission on notice that NMTV's ownership structure was dominated by Trinity. Trinity Exceptions at 15, 22. Trinity suggests that the Commission should rely on the "uncontradicted" testimony of Colby May that he "discussed" the relationship between TBN and NMTV with Glasser when the Odessa application was filed. Id. at 22. But what was really said in those discussions? Surely not that TBN supervised the

construction of NMTV stations, arranged for sites and equipment, provided payroll, accounting and bookkeeping services, legal fees, tax return preparation, and accounting (Tr. 2393-2395); provided engineering services (Tr. 3233-3234, 3239-3240); or that NMTV had no checking account, that no NMTV officer except TBN employees had signed an NMTV check, and that TBN provided NMTV with an open line of credit (Tr. 1545-1548, 3233, 3236); or that the Odessa station would carry only TBN programming (Tr. 3233, 3236).

17. Stewart and Glasser did not provide testimony in this case, as they did in another notorious case. Fox, 10 FCC Rcd at 8484 ¶79. Trinity, carrying the burden of proof, elected not to call Stewart and Glasser. Thus, Trinity cannot now rely for any purpose on the "uncontradicted" nature of its own counsel's self-serving and vague recollection of some unspecified conversations he supposedly had with Commission employees.8/

18. Broadcast regulation is not a private colloquy held between the regulated and the regulator. Members of the public certainly would have not have enjoyed an opportunity to learn such material facts, as May says he privately disclosed to Stewart and

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8/ Trinity cites three cases for the proposition that "sworn testimony that is not contradicted or inherently incredible is dispositive." Trinity Exceptions at 22 n. 34. Each case is inapposite. Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543, 549 (D.C. Cir. 1969) involved the testimony of exceptionally credible public interest group witnesses who had monitored the station's programming -- a subject with which the station was obviously familiar, thereby permitting meaningful rebuttal and verification or contradiction of the testimony. Ramon Rodriguez and Associates, Inc., 9 FCC Rcd 3275, 3277 (Rev. Bd. 1994) involved the testimony of a construction permit applicant about the availability of a site -- a subject about which the facts were easily verifiable. Barry Skidelsky, 7 FCC Rcd 1, 9 (Rev. Bd. 1992) involved the testimony of an inherently credible husband and wife about their joint management of a station -- again, facts which could be verified and tested.

Glasser. The Commission certainly prefers on the record, forthright disclosure to informal and selective oral disclosures. See Fox, 10 FCC Rcd at 8485 ¶¶80-81.

V. STRONG COMMISSION ENFORCEMENT ACTION IS NECESSARY TO REINFORCE THE INTEGRITY OF THE COMMISSION'S MINORITY OWNERSHIP POLICIES

19. This case was designated and tried in the interest of specific deterrence and licensee accountability. It should be decided on those bases and on the additional basis of general deterrence. Affirmance of the I.D. will remind every licensee that it must never assume control of another licensee for years, conceal, then lie about it -- and expect to get away with it.

20. SALAD -- the leading Hispanic civil rights organization in Miami -- brought this case in order to preserve the integrity of the Commission's minority ownership policies. When nonminorities are allowed to take advantage of the limited opportunities for advancement under those policies, legitimate minorities pay dearly. Indeed, the policies themselves, under fire from several sources, can be preserved and eventually expanded only when they are administered free of scandal or peccadillo.

21. This case provides a prime example of what the D.C. Circuit has characterized as "strange and unnatural" business arrangements. Bechtel v. FCC, 957 F.2d 873, 880 (D.C. Cir. 1992). Tolerance for these structures undermine the minority ownership policies. For if anyone can arbitrarily establish a nongenuine structure and receive a minority preference, there is no incentive for anyone ever to do arms length business with a genuine minority.

22. The overwhelming evidence demonstrates that Trinity structured NMTV with no legitimate business purpose in mind other than to "game" the Commission on minority ownership. Anything but

zero tolerance for such "gaming" behavior will impair the comparative prospects of legitimate and law abiding minorities and undermine the effectiveness and legitimacy of the Commission's minority ownership policies.9/ As the Commission recently held in Commercial Realty St. Pete, Inc. (Order to Show Cause), 10 FCC Rcd 4313, 4320 ¶21 (1995) ("Commercial Realty"), a female "front" company seeking IVDS licenses must show cause why it "should not be barred from future auctions and prohibited from holding any Commission license." The Commission held that "each of the abuses and violations, standing alone, if proven, is sufficient to prohibit Commercial Realty and its principals from participating in future auctions and from being Commission licensees." The Commission took this step even though the company had defaulted on its auction down payments and thus was ineligible for the licenses it has fraudulently sought.10/

23. In MM Docket 94-149, the Commission encouraged members of the public to suggest new approaches to foster minority ownership.

9/ Recently, the Office of the President had occasion to point out the dangers of "self-certification" of a contractor's minority status, citing two cases in which Department of Defense contractors were convicted of falsely holding out their firms as minority owned. Office of the President, Review of Federal Affirmative Action Programs, July 19, 1995, at 66. The Report criticized abuses by "front companies", noting that "[s]elf-certification has obvious advantages in terms of the reduced administrative expense and regulatory intrusion. Nevertheless, this must be balanced with the importance of ensuring that affirmative action measures are fair, which means as free of abuses as can reasonably be achieved." Id.

10/ Dramatically underscoring the seriousness of the misconduct, the Commission stated that "if it is determined that Commercial Realty intentionally falsely certified on its application that it was woman-owned and controlled, because of the seriousness of such misrepresentation, we will refer the matter to the Department of Justice for possible criminal prosecution of Commercial Realty's principals." Commercial Realty, 10 FCC Rcd at 4319 ¶17.

These efforts will die an early death if the only minorities capable of trading in broadcast stations are the captives of well financed nonminority broadcasters.

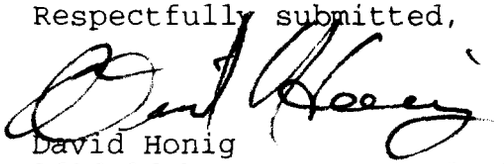
24. The Congressional debate over tax certificates shined a spotlight on the potential for abuse.[11/] The Commission must be especially careful not to permit even a hint of tolerance for minority ownership abuse to infect its pro-diversity policies.

CONCLUSION

25. No responsibility can weigh more heavily on the Commission than that of having to deny a license renewal application. To say that this step should not be taken lightly is a grave understatement. But here "we are here confronted with a licensee that could easily give the harsh penalty of non-renewal a very 'good name.'" Catoctin Broadcasting Corp. of New York, 2 FCC Rcd 2126, 2140 (Rev. Bd. (by Member Blumenthal) 1987). With profound sadness and resolve, SALAD respectfully urges the Commission to deny the WTBF-TV license renewal application.

11/ See Testimony of William Kennard, General Counsel, Federal Communications Commission, before the Committee on Finance, United States Senate, on FCC Administration of Internal Revenue Code Section 1071, March 7, 1995, at 13 (defining abuse as, inter alia, "a lack of real minority control of licenses"); Testimony of Kenneth J. Kies, Chief of Staff, Joint Committee on Taxation, before the Subcommittee on Oversight of the House Committee on Ways and Means, on the FCC Tax Certificate Program, January 27, 1995, at 3 (expressing concern that abuse could arise when "a minority investor purports to control the buyer...but effectively does not because of the small economic interest of the minority investor"); Statement of Glen A. Kohl, Tax Legislative Counsel of the Department of the Treasury, Before the Subcommittee on Oversight of the House Committee on Ways and Means, on the FCC Tax Certificate Program, January 27, 1995, at 3 (expressing concern that the Commission not "unfairly reward the participants of a tax avoidance scheme, possibly at the expense of a bona fide minority ownership group and/or a non-minority ownership group that was unwilling to engage in abusive tax planning.")

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, David Honig, this 28th day of February, 1996, hereby certify that I have caused to be delivered to the following persons by U.S. First Class Mail, postage prepaid, the foregoing "Reply to Exceptions":

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